IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL NO. 203 OF 1980

With

CIVIL APPLICATION NO. 3563 OF 1980
In
SECOND APPEAL NO. 203 OF 1980

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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PARVATIBEN, WD/O DECD. & ANR. - Appellant(s)
Versus
KAMLESH PRAMODRAI NANAVATI & ORS. - Respondent(s)

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Appearance :
MR. ASHISH M. DAGLI for Appellant(s).
MS. ARCHANA AMIN for MR. K.G. VAKHARIA for some of Respondent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 21/11/2006

ORAL JUDGMENT

The parties are finally heard.

2. The appeal has been admitted for hearing on 11th July, 1980. The records are in bad shape. Even the order of admission is in torn condition. However, from the order of admission, what I can understand is that the appeal has been admitted as it involves question of interpretation of Exhibits 115, 116 and 117 and has also been admitted for hearing on the substantial questions stated in paragraph Nos.(D), (F) and (G), which read as under:

> *"(D) Whether the lower Appellate Court erred in not holding that the suit was barred by law of limitation?*
>
> *(F) Whether the defendants had in any event acquired title by adverse possession?*
>
> *(G) Whether the lower Appellate Court erred in not holding that the suit was barred by the principles of constructive res judicata and also by provisions of Order 23 Rule 4 of the Code of Civil Procedure and Order 2 Rules 2 and 3?"*

3. The history leading to the litigation is that one Manishanker Kikani was a known scholar and was respected by the public; on his death, he was survived by his son - Vajeshanker and widow – Bhagirathi Devi. It appears that after the death of Bhagirathi Devi and Vajeshanker, the property was succeeded by Jaikunwar,

widow of Vajeshanker. The said Jaikunwar, in the memory of Manishanker Kikani, built a temple admeasuring 22 x 20 ft. and also constructed three rooms, which were attached to the temple. Jaikunwar, on her death, was survived by Chandralaxmi and Ratilaxmi. Chandralaxmi, under Exh.115, sold her right, title and interest in favour of Jagjivandas. On the strength of the said sale deed, the said Jagjivandas filed partition Suit No.129 of 1940. The parties are not sure about the year of filing of the suit, but, they say that it was somewhere around 1940. During the pendency of the suit, Ratilaxmi, who held half right in the property, also died and the legal representatives were substituted on records. Ratilaxmi was survived by two sons, namely, Mahendra and Pramod. During the pendency of the partition suit, said Mahendra, *vide* Exh.116 dated 5th June, 1952, sold his share to the original plaintiff - Jagjivandas. Thereafter, *vide* Exh.117 dated 17th January, 1953, Pramod also sold his share in favour of Jagjivandas. As a consequence of these different sale deeds, Jagjivandas became the absolute owner of the property, which belonged to Vajeshanker and Bhagirathi Devi or which was succeeded by Jaikunwar or in the end, which was succeeded by Chandralaxmi and Ratilaxmi. The present plaintiff-Jagjivandas filed the present suit seeking possession of three rooms, which were in possession of the present appellants. The suit

was contested by the present appellants so also by some of the erstwhile owners. The erstwhile owners submitted that the temple and the room attached with it were not sold in favour of Jagjivandas. However, the learned trial Court dismissed the suit. Being aggrieved by the said judgement and decree, the plaintiff-Jagjivandas filed regular First Appeal before the first Appellate Court. The first Appellate Court came to the conclusion that the successors to the property have sold their right, title and interest in favour of the plaintiff and as the plaintiff had become the absolute owner of the property, he was entitled to evict the present appellants.

3.1 It appears that the heirs of Chandralaxmi were joined as parties to the suit and similarly, the heirs of Ratilaxmi were also joined as parties to the suit. The appeal was allowed, the successors and legal representatives of Chandralaxmi (daughter of Vajeshanker) did not challenge the judgement and decree passed by the learned first Appellate Court. The present appeal was filed by Shivlal (since deceased) and the legal representatives/successors of Ratilaxmi. Subsequent to the filing of the appeal, the successors of Ratilaxmi have entered into an agreement with the original plaintiff and they withdrew their challenge to the appellate judgement.

3.2 The present appellants before me are successors of Shivlal @ Shivdutt Karsanji Rajgor, who happened to be in possession of those three rooms.

4. Shri Dagli, learned Counsel for the appellants, submits that from Exhs.115, 116 and 117, it would clearly appear that the property in dispute was never sold either by Chandralaxmi or successors of Ratilaxmi to Jagjivandas, the plaintiff, and under the circumstances, no decree could be granted. It is also submitted by him that the appellants had acquired the title by adverse possession. Shri Dagli also submits that the lower Appellate Court erred in not appreciating that the suit was barred by limitation and was also barred by the principles of constructive *res judicata*, so also, under the provisions of Order XXIII, Rule 4 of the Code of Civil Procedure and Order-II, Rules 2 and 3 of the Code.

5. So far as interpretation of Exhs.115, 116 and 117 is concerned, I must immediately reject the arguments of the learned Counsel for the appellants that the said temple and the rooms were not sold by the erstwhile owners to the present plaintiff. Under Exh.115, Chandralaxmi had sold all her rights, title and interest in favour of Jagjivandas. The remaining half of the

property was sold by Mahendra and Pramod under sale deeds, Exhs.116 and 117, respectively. If all these persons, who were the owners of the properties, had sold the property and have admitted the factum of sale, then, it cannot be said that the property was not sold in favour of the plaintiff. Even otherwise it would clearly appear that the sellers had not reserved any rights unto them either in relation to temple or in relation to any other property. The present appellants, who are the occupants, are not entitled to challenge the title of Jaikunwar, Chandralaxmi, Ratilaxmi, Mahendra or Pramod. Once those persons say that they had sold all their rights, title and interest in the property in favour of Jagjivandas, then, the person, who is not challenging the title or authority to sell, cannot say that the title could not be conveyed.

After going through Exhs.115, 116 and 117, I am unable to hold that the plaintiff is not the owner of the property.

6. Shri Dagli, learned Counsel for the appellants, placing reliance upon Article 64 of Limitation Act, 1963 (“the Act” for short), submits that the suit of the plaintiff is barred by limitation because it has not been filed within twelve years from the date of dispossession.

At the same time, he submits that the defendants have perfected their title by adverse possession.

7. Article 64 of the Act applies to a case where the suit is not based on title, but, is by a person who was in settled possession but has been dispossessed by the trespasser. In such a case, the starting point of limitation would be the date of dispossession. In the present matter, Article 65 of the Limitation Act would apply with full force. Once the defendants-appellants say that they have perfected the title by adverse possession, then, they will have to prove to the satisfaction of the Court that on a particular date, they asserted their hostile title, they brought it to the notice of the present plaintiff, the assertion was contrary to the interest of the plaintiff that they were staying in the property in their own rights. The title by adverse possession cannot be acquired secretly or without making a public declaration of the hostile attitude or animus. In the present case, the appellants never asserted their hostile title prior to 1972, but, in the written statement started asserting that they have become the owners by adverse possession. From the plain and simple language of Article 65 of the Act, it would clearly appear that a suit would be well within limitation if there is no starting point of adverse possession.

8. The Court below was absolutely justified in holding that the suit was not barred by limitation and the defendants have not acquired any title by adverse possession.

9. It was next contended that the suit was barred by the principles of constructive *res judicata*. I do not understand how the principles of constructive *res judicata* would apply. The principle of constructive *res judicata* would apply to a case where the plaintiff was entitled to some decree or relief, but, he did not ask for it and by his own action, he had given up the said relief. Present is not a case like that.

10. So far as application of Order XXIII, Rule 1 of the Code is concerned, the argument has to be rejected by observing that while the earlier suit was pending and a preliminary decree was framed, the plaintiff had purchased the entire property. Once the plaintiff became the absolute owner of the total property, he could not continue with the earlier suit because a person cannot claim partition against his own self. The facts, as narrated above, show that on the strength of Exh.115, the plaintiff had filed a suit for partition, but, during the pendency of the suit, he had purchased the rest of the

property.

11. So far as application of Order-II, Rule 2 of the Code is concerned, the same is also a misconceived argument. The plaintiff did never file any suit against the present defendants seeking their eviction and if that be so, the principles contained under Order-II, Rule-2 would not apply.

12. After giving my thoughtful consideration to all the questions raised, I am unable to hold that there is any scope of interference in the matter. I, therefore, answer all the questions against the interest of the appellants. The appeal deserves to and is, accordingly, dismissed. No costs. Let a decree be framed accordingly.

13. Consequent upon the dismissal of the appeal, there is no need to pass orders on Civil Application No.3563 of 1980. It is, accordingly, disposed of.

[R.S.Garg, J.]

*kamlesh**